

Serial No.: 10/707,674
Confirmation No.: 1673
Applicants: WARE, Douglas R. *et al.*
Atty. Ref.: 05233.0009.NPUS01

PROVISIONAL ELECTION WITH TRAVERSE:

Applicant provisionally elects Group I, claims 1-15, and the species A, a and aa (*E. coli* 0157:H7); X, a, aa and a (beef meat); B and 3 (Lactobacillus microorganism); and C, b, 3, i and ih (L7), all with traverse, which read on at least claims 1-5, 9-15.

REMARKS

REMARKS REGARDING GROUP ELECTION

In the Office Action, restriction is alleged to be required, under 35 U.S.C. § 121, to one of the following groups of claims:

Group I: Claims 1-15, drawn to a first method of reducing pathogen content of meat product (class 424, subclass 93.45);

Group II: Claims 16-29, drawn to a second method of reducing pathogen content of meat or a meat product (class 424, subclass 93.45);

Group III: Claims 30-40, drawn to a first method of reducing pathogen content of meat or a meat product (class 424, subclass 93.45); and

Group IV: Claim 41, drawn to a first method of reducing pathogen content of meat or a meat product (class 424, subclass 93.45).

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As recited under M.P.E.P. 803, restriction is appropriate only when the groups can be shown to be distinct and there would be a "**serious burden**" placed on the Examiner to examine more than one group of claims. No such serious burden has been established and applicant respectfully requests that this restriction be withdrawn.

Applicant respectfully asserts that a *prima facie* case for restriction has not been established. All of the asserted claim groups fall into the exact same class, namely, class 424. Further, all of the claim groups also fall into the exact same subclass, 93.45, and none of the groups have been divided into any additional subclasses. A search of one single subclass of one single class, by definition, cannot impose a serious searching burden. Absent a *prima facie* case for restriction, the requirement must be withdrawn.

Applicant also respectfully asserts that an increased search burden cannot be justified based on claim scope. All of the claims are directed to methods. All of the method claims are directed to methods of reducing pathogen content. All of the method claims relate to reducing the pathogen content of meat and meat products. The well-defined and limited claim scope necessarily imposes only a reasonable search, which is well within the efficiency of the PTO.

An increased searching burden is also not apparent from the Office Action. The examiner's comments in the Office Action add nothing to support an increased searching burden, but merely recite statements from the Manual of Patent Examining Procedure ("MPEP"). Merely reciting text from the MPEP does not meet the burden of establishing a *prima facie* case for restriction. No comments are provided as to why a search burden of all groups is serious and, thus, a *prima facie* case for a restriction requirement has not been met.

A restriction requirement is imposed "only" when it would be a serious burden on the examiner to examine all of the claims at once. No serious searching burden has been established and, thus, the burden to impose the restriction has not been met and remains with the PTO. Withdrawal of the restriction and examination of all claim groups is respectfully requested.

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REMARKS REGARDING SPECIES ELECTION

In the Office Action, an unnecessarily complex and illogical species restriction is imposed. As best as Applicant is able to determine, restriction is again imposed, with respect to any Group elected, to the alleged species as follows:

A. Where the pathogen is selected from:

- a. *E. coli* pathogen:
 - aa. *E. coli* 0157:H7; or
 - bb. other.
- b. *Staphylococcus* pathogen:
 - ba. *Staphylococcus aureus*; or
 - bb. other.
- c. *Salmonella* pathogen:
 - ca. *Salmonella typhirium*, wherein the meat product is unprocessed meat, fish, shellfish, or a processed meat material; or
 - cb. Other

X. Whereby the meat product is:

- a. Unprocessed:
 - aa. meat:
 - a. beef meat;
 - b. pig meat
 - c. chicken meat;
 - d. turkey meat;
 - e. lamb meat;
 - f. deer meat;
 - g. buffalo meat;
 - h. alligator meat; or
 - i. snake meat.

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ab. Whereby the fish is selected from:

- a. salmon;
- b. catfish;
- c. trout;
- d. flounder;
- e. haddock;
- f. cod.
- g. mackerel;
- h. tuna;
- i. swordfish;
- j. shark; or
- k. squid.

ac. Whereby the shellfish is selected from:

- a. clam;
- b. scallop;
- c. mussel;
- d. oyster;
- e. abalone;
- f. lobster;
- g. shrimp;
- h. crab; or
- i. crayfish; or

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b. Whereby the processed meat material is selected from:

- a. ground beef;
- b. ground turkey;
- c. ground chicken;
- d. beef sausage;
- e. pork sausage;
- f. chicken sausage;
- g. hot dogs; or
- h. bologna.

B. Whereby the lactic acid producing microorganism comprises:

- 1. *Bacillus* microorganism;
- 2. *Bifidobacterium* microorganism;
- 3. **Lactobacillus microorganism;**
- 4. *Pediococcus* microorganism; or
- 5. *Streptococcus* microorganism.

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C. Whereby the process or composition comprises:

- a. one lactic acid producing microorganism selected from:
 1. *Bacillus* microorganism;
 2. *Bifidobacterium* microorganism;
 3. *Lactobacillus* microorganism;
 - 3a. wherein the lactic acid producing microorganism comprises:
 - i. *Lactobacillus acidophilus* microorganism selected from the group consisting of:
 - ia. M35;
 - ib. LA45;
 - ic. LA51;
 - id. L411
 - ie. NPC 747;
 - if. NPC 750;
 - ig. D3; or
 - ih. L7.
 4. *Pediococcus* microorganism; or
 5. *Streptococcus* microorganism; or
 - b. two or more lactic acid producing microorganisms selected from the following – please specify mixture:
 1. *Bacillus* microorganism;
 2. *Bifidobacterium* microorganism;

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3. Lactobacillus microorganism;
- 3a. wherein the lactic acid producing microorganism comprises:
 - i. *Lactobacillus acidophilus* microorganism selected from the group consisting of:
 - ia. M35;
 - ib. LA45;
 - ic. LA51;
 - id. L411
 - ie. NPC 747;
 - if. NPC 750;
 - ig. D3; or
 - ih. **L7.**
4. Pediococcus microorganism; or
5. Streptococcus microorganism.

Applicant respectfully traverses this requirement. For the purpose of clarity, Applicant has highlighted with bolding and underlined the provisionally elected species above. Please also note that, with regard to the *Lactobacillus acidophilus* strains identified in C,a,3a,i,ih and C,3,b,3a,i,ih, the species restriction failed to include all of the claimed strains. In particular, strain L7 was not identified, but was clearly identified in claims 15, 29 and 38. Accordingly, L7 was added to the alleged species restriction in accordance with the structure imposed in the Office Action. If this was not an error, Applicant respectfully requests that a new Office Action be issued with an explanation as to why L7 was not included.

In the Office Action, no substantive comments are provided as to why a species restriction is deemed necessary. Absent any comments whatsoever, Applicant does not have a full and fair opportunity to respond. Accordingly, Applicant requests that the species restriction be withdrawn in its entirety.

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Further, Applicant respectfully asserts that a search of any one of the alleged species would necessarily include all references from every other species. For example, the search results from a search of the species "ground beef" is likely to be identical to the search results from a search of the species "ground turkey." In addition, this is especially true with regard to species such as alligator meat, snake meat, haddock, squid, mussel and the dozens of other species alleged to require separate searches. Applicant respectfully asserts that a search of all of the alleged species is likely to impose no more than a reasonable searching burden.

Applicant respectfully notes that the species requirement is nonsensical. For example, on multiple occasions, a *Bacillus* microorganism is considered to be a distinct searching burden from a *Lactobacillus* microorganism search burden. This cannot be the case because any search of *Lactobacillus* would necessarily include a search of *Bacillus*, and thus, the restriction is arbitrary and superfluous.

Finally, Applicant respectfully notes that searching is performed electronically. As such, there can be no serious searching burden to perform a thorough and complete search of the full scope of the claims. A proper search of the full scope of the claims would result in an efficient and effective examination of the instant application. This should be a goal of the PTO, which would not be achieved from having Applicant file the application dozens if not hundreds of times with the PTO examining each and every filing.

Applicant respectfully requests that the entire species restriction be withdrawn as unnecessary and unjustified, and highly inefficient.

Remarks Regarding Generic Claim

In the Office Action, the Examiner states that claims 1, 16, 30 and 41 are generic. However, based on the above understanding of the restriction requirement, claims 2, 9-11, 17, 23-25, 31 and 40 are also generic. Accordingly, Applicant respectfully requests that, should the species restriction not be entirely withdrawn, each of remaining species be examined during prosecution of this application.

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CONCLUSION

The undersigned representative requests any extension of time that may be deemed necessary to further the prosecution of this application.

The undersigned representative authorizes the Commissioner to charge any additional fees under 37 C.F.R. 1.16 or 1.17 that may be required, or credit any overpayment, to Deposit Account No. 14-1437, Order No. 5233.009.NPUS1.

In order to facilitate the resolution of any issues or questions presented by this paper, the Examiner should directly contact the undersigned by phone to further the discussion.

Respectfully submitted,



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